IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

Writ Petition No. 1384 of 2006

Baburao Ganpat Kashmire ..Petitioner

vs.

Gorakh Dattu alias Dattatraya
Kashmire and others ..Respondents

Shri G.S.Godbole for petitioner
Shri M.M.Sathaye for respondent nos.1 and 4.

CORAM: S.B.MHASE J.
19th April, 2006

P.C.

1. Heard both the learned Counsel.

2. The order dated 1st January, 2005 passede by VII Adhoc Additional District Judge, Nashik below Exh.14 in Civil Appeal No.39 of 2002 is challenged. By the said order respondent no.1/original plaintiff is allowed to add his mother Sindhu as plaintiff/respondent in the said appeal.

3. Respondent no.1 Gorakh has filed Reg.Civil Suit No.739 of 1998 against the petitioner and respondent nos.2 and 3 in the Court of Civil Judge, Jr.Dn., Nashik seeking partition and possession of one third share after the death of father of Respondent no.1 Dattatray. Petitioner No.1 Baburao is the grand father of respondent no.1. Petitioner no.1 Baburao's wife is Kamlabai who is respondent no.2 and deceased Dattatray and Prabhakar Baburao Kashmire, respondent no.3 are the sons of Baburao

and Kamlabai. Plaintiff/respondent no.1 Gorakh is the son of Dattatray and, therefore, he has claimed partition of one third share. Initially in the suit the mother of Gorakh i.e. Sindhu who is respondent no.4 in the present petition was not added as the co-plaintiff and/or defendant. During the trial also the petitioners and other defendants namely respondent nos.2 and 3 have not made any reference to the mother of Gorakh. However, it appears that while arguing the appeal before the Appellate Court, submission was made that the mother of Gorakh, namely, Sindhu, respondent no.4 is a necessary party to the suit and since all the necessary parties were not joined the suit shall be dismissed. It is pertinent to note that the said objection was taken for the first time in appeal and that too at the time of arguments. Since the said argument was developed respondent no.1 preferred application Exh.14 requesting the Appellate Court to allow him to join the said Sindhu respondent no.4, as co plaintiff along with him. The said application is allowed. Being aggrieved by that order present petition has been filed.

4. Learned Counsel Shri Godbole submitted that respondent no.4 can be at the most added as defendant but cannot be made as co plaintiff and more specifically when respondent no.4 is not coming forward herself. This argument has no merit. Sindhu is claimed to be the wife of Dattatray and mother of Gorakh and, therefore, she can be made as coplaintiff and Gorakh being the plaintiff has an option

to show any person as plaintiff provided the said person is ready to join as such but nothing has been pointed out to show that Sindhu has expressed to join herself as co plaintiff. On the contrary for respondent no.1 and respondent no.4 Shri Advocate Sathaye is appearing by joint vakalatnama. That shows that they have no conflicting interest with each other. Apart from that since the relationship is of mother and son and they are claiming the property of Dattatraya, they do not have any conflicting interest and they can very well join as co plaintiffs.

5. The other objection raised by the learned Counsel Shri Godbole is that the application is made at a belated stage when arguments were over at the appellate stage. It is interesting to note that when the fact that Sindhu is necessary party was within the knowledge of the petitioner who is appellant before the District Court, Nashik, the said point was not raised in the written statement. It was for the first time argued when the matter was finally heard by the Appellate Court. At that stage when defect was pointed out immediately respondent no.1/original plaintiff has taken steps to cure the defect. Apart from that when it is brought to the notice of the Appellate Court for the first time that the suit suffers for not joining all the necessary parties, it would not have been possible for the Appellate Court to dismiss the suit for want of necessary parties because whenever the question is raised either in the suit or at the time of hearing at the

appellate stage that somebody is necessary party and the Court finds that the said party is a necessary party to be joined the Court is under obligation to give direction to the plaintiff to add such party either as plaintiff or defendant and if inspite of directions being given, there is failure on the part of the appellant to join the necessary parties then the suit can be dismissed, is a settled position of law. Therefore, in absence of application Exh.14, had it been noticed by the Appellate Court that Sindhu was a necessary party accepting the arguments advanced by the appellant, the Court was under obligation to give direction to respondent no.1 to join Sindhu as party to the proceedings either as plaintiff or defendant. However, immediately after the said point was developed in the arguments by the learned Counsel for the appellant, respondent no.1 has taken steps to rectify the defect in the said suit. Under these circumstances, I find that there is no merit in the petition. It deserves to be rejected. It is accordingly rejected.

6. It is made clear that there is dispute about the relationship of parties which is to be adjudicated by the courts below. Reference to relationships made in this petition is only to find out legality and propriety of impugned order and, therefore, this order shall not be taken as findings by this Court, regarding disputed relationship of parties to the suit.

(S.B.HASE J.)